Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

MULK RAJ DASS,

Petitioner,

v.

JOHN B.Z. CAPLINGER, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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5 pgs

QUESTIONS PRESENTED

Whether the Fifth Circuit Court of Appeals decided issues that are in conflict with other circuits:

(a) When it held that the dismissal of a 42 U.S.C. § 1983 action by the District Court on its own initiative was cognizable under 28 U.S.C. § 1915A(b)(1) for a litigant who was incarcerated but paid his filing fee in full and whereby he was not permitted either to amend or to serve the complaint upon the defendants.

(b) When it held that one year statute of limitation is applicable to a 42 U.S.C. § 1983 claim pursuant to article 3492 for delictual actions within the State of Louisiana.

(c) When it held that a claim filed under § 1983 on due process violations, unrelated to litigant's prosecution and conviction, is foreclosed within *Heck v. Humphrey, et al.*, 512 U.S. 477, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994).

LIST OF PARTIES

1. John B.Z. Caplinger
2. Chris Sale
3. The Solicitor General

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The Petitioner, Mulk Raj Dass, respectfully prays that a Writ of Certiorari be issued to review the judgment of the District Court and its affirmation by the United States Court of Appeals for the Fifth Circuit issued on January 29, 1999 and its reaffirmation by denying the petition for rehearing dated February 24, 1999.

OPINION BELOW

A copy of the judgment of the District Court and its affirmation by the Fifth Circuit Court of Appeals in *Mulk Raj Dass v. John B. Z. Caplinger, Chris Sale* appear in the Appendix hereto.

STATEMENT OF JURISDICTION

On January 29, 1999, the Fifth Circuit Court of Appeals entered its ruling affirming the judgment of the United States District Court of the Western District of Louisiana, Lake Charles Division. Jurisdiction in this Court is conferred by 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Article III Section One and Section Two, Subsection One

> Section 1. The judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and the inferior Courts, shall hold their Offices during good Behavior, and shall, at stated times, receive for their services a

Compensation, which shall not be diminished during their Continuance in Office.

Section 2.[1] The judicial power shall extend to all cases, in Law and in Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases effecting Ambassadors, other public ministers and Consuls; to all Cases of admiralty and maritime Jurisdiction; — to controversies to which the United States shall be a Party; to controversies between two or more different States; — between a State and Citizens of another State; — between Citizens of different States; between Citizens of the same State claiming Lands under the Grants of different States, and between a State, or Citizens thereof, and foreign States, Citizens or Subjects.

Constitution of the United States, Amendment Five

No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War, or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law, nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

This case embraces the issues of due process violations caused by the Respondents in their capacity as immigration directors. The Petitioner raised these issues in his claim filed under 42 U.S.C. § 1983[1] in the Western Division of Shreveport, Louisiana. These violations occurred while the Petitioner was held in the care and custody of the Respondents in a non-prisoner status, and thereafter, they transferred him to a different state without granting him a Rule 40 hearing and though he was held in a county jail as a pretrial detainee in a different state, yet his due process rights were violated by the Respondents from Oakdale, Louisiana, and their actions were unrelated to Petitioner's prosecution and later on to his conviction.

The due process violations caused by the Respondents have had everlasting impact on the Petitioner's status as a pretrial detainee and a convicted person.

In his appeal and petition for rehearing to the Appellate Court, the Petitioner has argued predominantly on the pivotal issues of:

(a) The dismissal of Petitioner's claim under 28 U.S.C. § 1915A(b)(1), *i.e.*, the claim is frivolous and fails to state a claim upon which a relief may be granted.

(b) The dismissal of Petitioner's claim pursuant to one year statute of limitation within the State of Louisiana.

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1. The complaint was filed along with the filing fee on October 1, 1997 under Docket No. 97-1971 in the Western Division of Shreveport, Louisiana.

(c) Foreclosure of Petitioner's § 1983 claim pursuant to *Heck v. Humphrey, et al.*

The Petitioner is a native of India and resides permanently in London, England since 1970. The Petitioner was awarded a Ph.D. in physical chemistry from London University and worked as a scientist at Max Planck Institute in Berlin, Germany, and later on taught chemical technology at the Ruhr Universitat, Bochum, Germany.

The Petitioner entered the United States on May 5, 1990 on a B-2 non-immigrant visitor's visa which was adjusted to an L-1 visa in June 1991.

As a result of an indictment from New Jersey, Petitioner was incarcerated at Fairton, New Jersey and unable to get out on a release bond. Prior to the expiration of his L-1 visa in June 1992, the Petitioner paid a sum of $2,500.00 to Mr. Joules Coven of the law firm of Lebenskoff and Coven, N.Y., for the purpose of renewing his L-1 visa. Mr. Coven disappeared for about five weeks and then he came back in the first week of July. He told the Petitioner that the deadline to file an extension had already been expired and returned back $700.00 of the funds advanced to him by the Petitioner.

The Petitioner was found guilty and sentenced to 21 months of imprisonment and three years of Supervised Release.

After having served 21 months of sentence, the Petitioner was released on a $10,000.00 I.N.S. bond.

On March 30, 1993, while incarcerated, the Petitioner was served with an "Order to Show Cause" and on January

13, 1994, he was ordered deported pursuant to § 241(a)(1)(B)[2] by the Immigration Judge in Oakdale, Louisiana.

The Petitioner appealed the Judge's decision on July 5, 1994 and the appeal was expeditiously dismissed on August 26, 1994 by the Board of Immigration. Meanwhile, Petitioner's Supervised Release was revoked and he was sentenced to 9 months of imprisonment.

Later on, the Petitioner retained the services of another immigration attorney in San Antonio, Texas, who appealed in November 1994 the decision of the B.I.A. to the Fifth Circuit. The Fifth Circuit dismissed the appeal due to lack of jurisdiction in this case and advised the Petitioner on August 8, 1995.[3]

From the period of time onwards from the Petitioner's B.I.A. appeal (August 26, 1994), he was under I.N.S. supervision from the Oakdale office, which appeared to monitor the Petitioner's sojourn through the system with active interest.

Petitioner's nine month sentence was completed on March 9, 1995 and he was still held at F.C.I. Oakdale in the care and custody of Caplinger, *et al.* During this time,

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2. Section 241(a)(1)(B) provides in pertinent part: "Any alien, who entered the United States without inspection is deportable." In Petitioner's case, he was inspected and his passport was duly stamped upon his arrival at LAX Airport on May 5, 1990.

3. The case in the Fifth Circuit was filed on November 25, 1994 under Docket No. 94-41219 and alien #A71563885.

Caplinger, *et al.* made repeated promises to Petitioner's attorney to grant him a $30,000.00 I.N.S. Release Bond. In that respect, the Petitioner found out that Caplinger, *et al.* were in continuous touch with Mr. Stephen Lewis, the United States Attorney in Tulsa, Oklahoma, who had been incubating additional charges against the Petitioner for an indictment to be served upon him later that Spring and thus, Caplinger, *et al.* had been engaged in a deliberate series of promises, obfuscations, denials and postponements so that the Petitioner's attorney would not seek any relief in the District Court.

Finally, the date of April 26, 1995 was set for Petitioner's I.N.S. bond in the amount of $30,000.00. On this day, the Petitioner was simply picked up by the United States Marshals and transported to the county jail of Tulsa, Oklahoma.

The Petitioner was not advised of the outstanding indictment and was denied a Rule 40 hearing despite the fact that it was stipulated on the arrest warrant. The Petitioner considers that promises of the Release Bond on a regular basis were part of wanton and deceitful acts by Caplinger, *et al.* for the purpose of:

(a) stopping the Petitioner's attorney from proceeding in a Federal Court on a Bond Hearing.

(b) holding the Petitioner in the I.N.S. custody in a non-prisoner status as a favor to Mr. Lewis, the United States Attorney in Tulsa, Oklahoma.

(c) not having an indictment issued at that time.

In the Bond hearing of May 1995 in Tulsa, Oklahoma, it was the first time that the Petitioner learned as a result of direct testimony by Mr. Rickel, the F.B.I. agent,[4] that a deportation warrant was outstanding against the Petitioner despite the fact that his case was still on appeal with the Fifth Circuit.

On June 15, 1995, Caplinger, *et al.* went ahead and granted an I.N.S. Bond in the amount of $75,000.00 which was canceled on August 6, 1995, one day prior to Petitioner's Bond hearing on his criminal case.

In order to justify their actions in canceling Petitioner's I.N.S. Bond, Caplinger, *et al.* misstated the facts to the United States Attorney's Office on August 6, 1995 that:

(1) Petitioner's visitor's visa had expired on June 19, 1991 and thereafter he was an illegal alien.

(2) Mr. Caplinger had learned that Petitioner's conviction was affirmed on May 1994 by the Third Circuit Court of Appeals.[5]

(3) a deportation order was outstanding against the Petitioner due to his overstay.

The Petitioner alleges that misstatements of known facts were made knowingly, intelligently and voluntarily by

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4. In the hearing of May 5, 1995, the F.B.I. agent, Mr. Rickel, testified (p. 15 of the bond hearing transcript) that there was a deportation warrant against the Petitioner.

5. A copy of affirmation of Petitioner's conviction was submitted to B.I.A. on July 5, 1994 along with other documents.

Caplinger, *et al.* and, as a result of these actions, Petitioner was subjected to very harsh conditions of his incarceration at Tulsa County Jail which caused permanent damage to Petitioner's health.

The Petitioner went to trial in Tulsa, Oklahoma and was found guilty on December 18, 1995, and thereafter, he was sentenced to thirty-seven months on July 12, 1996 and served most of his sentence at Eden Detention Center, Eden, Texas.

The Petitioner became aware of Civil remedy to his immigration tragedy in the early part of August 1997 while he was serving his time at Eden Detention Center, Eden, Texas. The Petitioner was transferred to Oakdale, Louisiana, in the third week of September 1997 and filed a complaint on October 1, 1997 along with a filing fee of $150.00. The said complaint was filed pursuant to 42 U.S.C. § 1983 in the Western Division of the United States District Court in Shreveport, Louisiana. (*See* n.1, *supra*).

The actions of Caplinger, *et al.* have adversely affected Petitioner's custodial status due to his inability to get out on a Bond, while his co-defendant, Mr. James T. Kalyvas, was out on a Bond until November 1, 1997.

In Petitioner's case, the judge in Oklahoma has always maintained that he will release the Petitioner on a Bond, but was restrained by the deportation warrant.[6]

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6. The Petitioner has never been served with a deportation warrant, but from time to time, Caplinger, *et al.* have contacted different judges and advised them of the outstanding deportation warrant against Petitioner.

A similar recurrence has happened in New York, whereby the Petitioner has been unable to get out on a Bond due to his outstanding problem with the immigration and his co-defendant, Ms. C. Peterson, is out on a signature bond.

The impact of wanton and deceitful actions undertaken by Caplinger, *et al.* has been very fatal to the Petitioner and as a result, *his suffering has not ceased as yet.*

After filing the claim under § 1983, the Petitioner was in touch with the *Pro Se* docketing clerk on a regular basis and was advised that the clerk shall be serving the complaint directly upon Caplinger, *et al.*

In December 1997, the Petitioner spoke to the docketing clerk and was surprised to find out that the complaint was not served upon the defendants as yet and thus filed a motion requesting the District Court to authorize the service of the complaint and expressed his concern as to the time constraints.[7]

In response to Petitioner's motion, the Magistrate Judge Alonzo Wilson answered by dismissing the complaint with prejudice pursuant to 28 U.S.C. § 1915A(b)(1) as being a frivolous complaint. The Report and Recommendation, as in Appendix B, justified Petitioner's detention by Caplinger, *et al.* and his transfer to Tulsa, Oklahoma, without a pre-transfer hearing, application of a one year statute of limitation pursuant to State of Louisiana law, and application of *Heck*'s doctrine to bar Petitioner's claim under 42 U.S.C. § 1983.

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7. The motion requesting the Court's authorization for service upon the defendants was filed on February 2, 1998.

The Petitioner responded by objecting to all the issues pursuant to Fed. R. Civ. Proc. 72(b) and filed a memorandum with all the objections to Report and Recommendation.

On March 19, 1998, the Honorable Judge James T. Trimble, Jr. issued a final order of judgment dismissing the complaint under 28 U.S.C. § 1915A(b)(1) as shown in Appendix C.

The Petitioner appealed the judgment to the Fifth Circuit and filed a *Pro Se* brief on July 23, 1993, under Docket No. 98-30317, titled *Dass v. Caplinger.*

On January 20, 1999, the Fifth Circuit denied Petitioner's appeal and supported the conclusions drawn by the Magistrate Judge Alonzo Wilson as shown in Appendix A.

On February 5, 1999, the Petitioner filed a petition for rehearing of the Appellate Court's decision pursuant to Fed. R. App. Proc. 41 on the issues of:

(a) Application of 28 U.S.C. § 1915A(b)(1) in Petitioner's case.

(b) Court's interpretation of *Heck*'s doctrine.

(c) Court's interpretation of 8 U.S.C. § 1252(a)(3).

(d) Application of one year statute of limitation to Petitioner's case.

The petition for rehearing was denied on February 24, 1999, Appendix D.

REASONS FOR GRANTING THE WRIT

It has been a long-established practice in American Jurisprudence that whenever one circuit court makes a decision which is contrary to the decisions rendered by the other circuit courts of the land, the aggrieved party has a right to go to the highest court of the land and seek its governance in steering the courts in the right direction by interpreting the statute and the law for the other courts to follow them correctly.

I.

THE DISTRICT COURT ABUSED ITS DISCRETION BY APPLYING THE STATUTE OF 28 U.S.C. § 1915A(b)(1) TO DISMISS PETITIONER'S COMPLAINT AND THE FIFTH CIRCUIT AFFIRMED THE RULING OF THE DISTRICT COURT.

In Petitioner's case:

(1) He paid his filing fee in full along with the complaint filed under 42 U.S.C. § 1983 in the Western Division of Shreveport, Louisiana. (*See* n.1, *supra*).

(2) His complaint was never served upon the defendants and he was repeatedly told by the docketing clerk that the court shall be directly serving the complaint upon the defendants. (*See* n.7, *supra*).

(3) He was not permitted to amend his complaint pursuant to Fed. R. Civ. Proc. 15(a).

(4) Petitioner's complaint was dismissed with prejudice under 28 U.S.C. § 1915A(b)(1) as being frivolous and lacking arguable basis either in law of fact.

(5) The complaint was dismissed by the District Court on its own initiative.

The Petitioner pre-paid the filing fee in full for a § 1983 action and never made a *forma pauperis* application to the court, neither in conjunction with the filing of the complaint nor at any time thereafter. In fact, the Petitioner made numerous calls to the docketing clerk requesting for appropriate forms for summons to serve the complaint upon the defendants within the compliance of Fed. R. Civ. Proc. 4. The docketing clerk insisted upon that the court would dictate and direct the process service upon the defendants. (*See* n.7, *supra*).

Aware, perhaps of the materiality as a matter of law and whether or not Petitioner's complaint is filed *in forma pauperis*, the Magistrate Judge decides in a one-line statement in the Report and Recommendation at page 2 stating, "This [28 U.S.C. § 1915A] statutory provision is completely independent of the informa pauperis statute found at 28 U.S.C. § 1915."

The statement outlined herein is purely *in dictum* and finds no support in the congressional history or motivating principles of the statute and/or any case law cited in its support.

In this instance, the Petitioner, while incarcerated, paid his filing fee in full to commence his action and to the extent that he made no application to the court to leave to proceed

in forma pauperis, frivolous or not, it cannot as a matter of law be adjudicated under 28 U.S.C. § 1915, *et seq.* The case law of § 1915 is undisputedly tailored to secure constitutional requirement of indigent prisoner's access, including public access, to courts of the United States. *Neitzke v. Williams*, 490 U.S. 319, 109 S. Ct. 1827, 104 L. Ed. 2d 338 (1989); *Adkins v. E.I. Dupont de Nemours & Co.*, 235 U.S. 331, 339, 69 S. Ct. 85, 89, 93 L. Ed. 43 (1948).

Whenever *in forma pauperis* claims are found either frivolous or lacking arguable basis whether in law or fact, a court has authority and power to dismiss it *sua sponte* under 28 U.S.C. § 1915; but where on the other hand a paying litigant, who does not petition public fisc to absorb the filing fee and the court costs of his litigation, brings frivolous litigation and/or one lacking arguable basis whether in law or fact, a court may not dismiss *sua sponte*, though it may extend however an opportunity to the litigant to amend his complaint pursuant to Fed. R. Civ. Proc. 15(a), but where the court must dismiss the claims, it must be under Fed. R. Civ. Proc. 12(b)(6), *Neitzke*, 490 U.S. at 328 and not under § 1915.

In *Whyatt v. City of Boston*, 35 F.3d 13 (1st Cir. 1994), the court outlined that within the general rule under Fed. R. Civ. Proc. 12(b)(6), dismissal for failure to state a claim are proper if process has been issued and served and plaintiff is given an opportunity to amend his complaint under Fed. R. Civ. Proc. 15(a).

In Petitioner's case, the District Court assumed that the Petitioner commenced his litigation from prison and thus derogated his status to a § 1915 jurisprudence, adjudicated being frivolous, malicious, failing to state a claim and dismissed with prejudice under 28 U.S.C. § 1915A(b)(1).

In the case of *Hughes v. City of Albany*, 76 F.3d 53 (2d Cir. 1996), the Second Circuit concluded that the District Court may not dismiss a complaint *sua sponte* under 28 U.S.C. § 1915(d) once the partial fee has been paid. A plaintiff who pays a partial fee must be treated as a full paying plaintiff, and in the normal course, the court must issue summons to be served upon the defendants in accordance with Fed. R. Civ. Proc. 4(b) and the plaintiff must have the opportunity to amend his complaint pursuant to Fed. R. Civ. Proc. 15(a).

In *Bryon v. Johnson*, 821 F.2d 455, 458 (7th Cir. 1987), the Seventh Circuit outlined that when a district court allows a litigant to proceed upon the payment of a partial filing fee, the court should treat the complaint in the same manner as a complaint that was not filed *in forma pauperis*. *Clark v. Ocean Brand Tuna*, 974 F.2d 48, 50 (6th Cir. 1992); *In Ref. Frankhouser*, 873 F.2d 1076 (8th Cir. 1989).

In the case of *Butler v. Leen*, 4 F.3d 772 (9th Cir. 1992), the Ninth Circuit stated, "the dismissal of an action as frivolous after the Plaintiff has paid a portion of the filing fee is inconsistent with the Federal Rules of Civ. Proc.".

In *Herrick v. Collins*, 914 F.2d 228 (11th Cir. 1990), the Eleventh Circuit outlined that a complaint is deemed filed upon payment of the filing fee; the Clerk shall issue summons and deliver the summons to the plaintiff or the plaintiff's attorney who shall be responsible for prompt service of the summons and a copy of the complaint.

Furthermore, under Fed. R. Civ. Proc. 15, the plaintiff must be permitted to amend his complaint to cure any defects before dismissal. *See Butler*, 4 F.3d at 773; *Clark*, 974 F.2d at 50; *Herrick*, 914 F.2d at 230.

In Petitioner's case, the court issued a Report and Recommendation and dismissed his complaint with prejudice under 28 U.S.C. § 1915A(b)(1) on its own initiative. The dismissal was affirmed on March 19, 1998 by a judgment issued by the Honorable Judge James T. Trimble, Jr. and the Appellate Court affirmed this decision.

II.

THE DISTRICT COURT ERRONEOUSLY APPLIED A ONE YEAR STATUTE OF LIMITATION AND THE FIFTH CIRCUIT COURT OF APPEALS AFFIRMED IT.

The District Court applied a one year statute of limitation in dismissing the Petitioner's complaint, and in affirming the ruling of the District Court, the appellate court supported its ruling by the case law of *Elzy v. Roberson*, 868 F.2d 793 (5th Cir. 1989), which outlined Louisiana's one year statute of limitation pursuant to La. Civ. Code. Ann. Art. 3492 (West Supp. 1988). The article 3492 governs suits for delictual actions which have been applied to § 1983 actions against state officials for personal injury and intentional torts within the State of Louisiana. The State of Louisiana also has a residual ten years prescriptive period that governs the personal and non-tort actions under article 3499.

In the case of *Elzy v. Roberson*, *supra*, the Fifth Circuit Court of Appeals interpreted the Supreme Court's ruling in *Owens v. Okure*, 488 U.S. 235, 109 S. Ct. 573, 102 L. Ed. 2d 594 (1989), outlining that the choice of a one year statute in dismissing a § 1983 claim was within the parameters set forth in *Owens v. Okure*, *supra* and found no error in the District Court's application of article 3492 to a § 1983 claim.

In Petitioner's case, the following actions violated his due process and these actions were not relevant to his prosecution and his conviction:

1) His attorney was promised on continuous basis by the Respondents and according to their final promise, the Petitioner was to be released from custody on an immigration bond of $30,000.00 by the end of April 1995 and Petitioner relied on these promises.[8]

2) The Petitioner was transferred from Oakdale, Louisiana, to Tulsa County Jail in Oklahoma without being granted a Rule 40 hearing despite the fact that such a hearing was stipulated on the arrest warrant.[9]

3) In the bond hearing of May 5, 1995, Mr. Rickel (F.B.I. agent) who was in touch with Mr. Hammond at INS Oakdale, Louisiana, testified to an outstanding deportation warrant against the Petitioner and failed to outline the pending appeal to the Fifth Circuit.[10]

4) On June 15, 1995, the Respondents went ahead and granted the Petitioner an immigration bond in the sum of $75,000.00.

5) The immigration bond was canceled on August 6, 1995, and Respondents misstated the facts to the United

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8. The understanding is outlined at page 72 of the bond hearing transcript dated May 5, 1995.

9. Rule 40 hearing argument was presented to the Fifth Circuit Court of Appeals by the Petitioner under Docket No. 98-30317.

10. Page 15 of the bond hearing transcript dated May 5, 1995.

States Attorney's office[11] to justify their actions by stating that:

> (a) the Petitioner's visa expired on June 19, 1991, and thereafter he was an illegal alien residing in the U.S.A.
>
> (b) a deportation order was outstanding against the Petitioner due to his overstay.
>
> (c) the Respondents had just learned that the Petitioner's conviction was affirmed in May 1994 by the Third Circuit.

The statement outlined in (c) is false due to the fact that a copy of said affirmation was submitted to the Respondents on July 5, 1994 at the time of filing appeal to the BIA's decision.

6) In Petitioner's attempt to get out on a bond on November 25, 1995, the judge was contacted by the Respondents and advised that the Petitioner should not be released on a bond.[12]

As a result of the above actions of the Respondents, the Petitioner was unable to get out on a bond and therefore

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11. The facts outlined in (a), (b) and (c) were submitted on August 8, 1995 by the United States Attorney's Office to the Court in a Memo in Case No. 95-CR-54-K.

12. In the bond hearing of November 25, 1995, the judge spoke about being contacted by the immigration from Oakdale, Louisiana and outlined his concerns about the Petitioner's immigration status (Trial Transcript dated November 25, 1995).

remained in Tulsa County Jail and was handicapped for fifteen months due to his inability to contact his family, friends and the outside world.[13]

The Petitioner became aware of these violations sometime in August-September 1997 after he received his documents pertaining to these events during his sojourn through the system, and immediately thereafter, he filed his 42 U.S.C. § 1983 claim on October 1, 1997, in the Western District of Shreveport, Louisiana. (*See* n.1, *supra*).

The District Court in dismissing Petitioner's claim calculated the time frame from November-December 1995 to October 1997 and concluded that his claim filed under § 1983 was time barred pursuant to a one year statute of limitation available for personal injury and intentional torts under article 3492 within the State of Louisiana.

The Petitioner asserts that the personal injury including intentional tort statute of limitations for one year within the State of Louisiana is not applicable to his action filed under § 1983.

The State of Louisiana has a one year statute of limitation under article 3492 for delictual actions, covering personal injury and intentional tort actions. In deciding the one year statute of limitation under article 3492, the District Court concluded that Petitioner's claims under § 1983 were analogous to the intentional torts caused by the government officials within the State of Louisiana and supported this decision by citing *Gaspard v. United States*, 720 F.2d 1097

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13. Exhibit 8 of the Petitioner's Brief filed with the Fifth Circuit (Docket No. 98-30317) outlines his dilemma for fifteen months.

(5th Cir. 1983), which is a tort claim case under FTCA, 28 U.S.C. § 1346(b).

In the case of *Owens v. Okure*, 816 F.2d 45 (2d Cir. 1987), the Second Circuit ruled and the Supreme Court affirmed in its ruling in *Owens v. Okure*, 488 U.S. 235, 109 S. Ct. 573, 102 L. Ed. 2d 594 (1989), a three year residual statute of limitation for personal injury claims rather than a one year statute of limitation for certain intentional torts, whereby one year statute of limitation in New York covers eight intentional torts such as assault, battery, false imprisonment, malicious prosecution, libel, slander, violation of the right to privacy, false words causing special damages, but different statutes of limitations are applied to other intentional torts not covered by the eight actions as outlined herein.

The Supreme Court held in *Owens v. Okure*, *supra* that for § 1983 actions, the general state statute should be borrowed pursuant to 42 U.S.C. § 1988[14] and where a state

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14. In relevant part, § 1988 provides:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offense against law, the common law, as modified and changed by the

(Cont'd)

has one or more statutes of limitations for certain intentional torts and a residual statute for all other personal injury actions, *the residual or general personal injury statute of limitations should apply.*

In the case of *Wilson-v. Gracia*, 471 U.S. 261, 109 S. Ct. 1938, 85 L. Ed. 2d 254 (1985), the Supreme Court stated:

> the characterization of § 1983 for statute of limitations purposes is derived from the elements of cause of actions and congress' purpose in providing it. These are matters of federal law. Since federal law is available to decide the question, the language of 42 U.S.C. § 1988 directs that the matter of characterization should be treated as a federal question.

85 L. Ed. 2d 262, 471 U.S. at 269.

This interpretation is also supported by Congress' third instruction in § 1988: "state law shall only apply so far as the same is not inconsistent with federal law. This requirement emphasizes the predominance in the federal interest in borrowing process, taken as a whole." 85 L. Ed. 2d at 262, 471 U.S. at 270.

(Cont'd)

> constitution and statutes of the States wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause . . .

42 U.S.C. § 1988.

In *Owens v. Okure, supra*, the Supreme Court stated that: "a rule endorsing the choice of the statute of limitation for intentional torts would be manifestly inappropriate, since every state has multiple intentional tort limitations." 102 L. Ed. 2d at 597.

The court further outlined that the analogy between § 1983 claim and state causes of action is too imprecise to justify such a result due to the fact that § 1983 claims cover a wide spectrum of issues which have very little or no resemblance to a common law of intentional torts.

The claims under § 1983 include discrimination in public employment on the basis of race or the exercise of First Amendment,[15] discharge or demotion without due process,[16] mistreatment of school children[17] and deliberate indifference to the medical needs of prison inmates.[18]

In the case of *Industrial Constructors v. Bureau of Reclamation*, 15 F.3d 963 (10th Cir. 1994), the court outlined that *Bivens* action for constitutional violations committed by federal agents is a judicially created remedy and it does

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15. *Burnett v. Grattan*, 468 U.S. 42, 104 S. Ct. 2924, 82 L. Ed 2d 36 (1984).

16. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 104 S. Ct. 2569, 82 L. Ed. 2d 869 (1985); *Bishop v. Wood*, 426 U.S. 341, 96 S. Ct. 2074, 48 L. Ed. 2d 684 (1976).

17. *Ingram v. Wright*, 430 U.S. 651, 97 S. Ct. 1401, 48 L. Ed. 2d 684 (1976).

18. *Estelle v. Gamble*, 429 U.S. 97, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976).

not carry its own statute of limitations. The federal courts generally borrow and apply the most closely analogous state statute of limitations, unless to do so would be inconsistent with the federal law. *Bivens* actions are essentially the same as those underlying § 1983 actions and the same statute of limitations is applicable to *Bivens* as it is to a § 1983 action.[19]

Federal law, not state law, controls the issue of when a federal cause of action accrues. *Baker v. Board of Regents of the State of Kansas*, 991 F.2d 628, 632 (10th Cir. 1993); *Newcomb v. Ingle*, 827 F.2d 675 (10th Cir. 1987).

In the case of Petitioner, the District Court applied the general one year statute of limitation under article 3492 for delictual actions including intentional torts committed by the state officials. The decision of the District Court in Petitioner's case is contrary to the ruling of the Supreme Court in *Owens v. Okure*, *supra* and other courts due to the fact that the article 3492 also governs the intentional torts within the State of Louisiana and the analogy between § 1983 claim and intentional torts is too imprecise. The actions defined under § 1983 and common law intentional torts have little or no resemblance to each other and therefore one statute covering both actions will be impracticable in deciding on claims filed under 42 U.S.C. § 1983.

The Fourth Circuit, in the case of *Johnson v. Davis*, 582 F.2d 1316, 1317 (4th Cir. 1978), held that one year statute of limitation is inapplicable to a § 1983 action on the grounds that it disregarded the constitutional values to be protected by § 1983 actions and unreasonably discriminated against those actions.

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19. The Petitioner's claim was classified as *Bivens* action by the District Court.

Likewise, in the Petitioner's case, the District Court failed to assess the extent of the constitutional violation in his claim filed under § 1983 and dismissed it pursuant to the general one year statute of limitation.

III.

THE STATUTE OF LIMITATIONS BEGIN TO RUN WHEN THE PLAINTIFF KNOWS OR HAS REASON TO KNOW OF THE EXISTENCE AND CAUSE OF THE INJURY.

In Petitioner's case, the District Court calculated the time frame from November-December 1995 to October 1997 to evaluate the application of the statute of limitation within the State of Louisiana.

The Petitioner did not become aware of his constitutional violations until August-September 1997 after he received his documents pertaining to various instances from March 1994 to December 1995 and became aware of his constitutional violations.

In fact, the violations have been continued ever since, and as a result of these violations, the Petitioner remains continuously incarcerated.

The judge in Oklahoma had expressed his desire to release the Petitioner on a bond in the criminal case, but was restrained by the existence of a deportation warrant. (*See* n.6, *supra*). The Petitioner's co-defendant, Mr. J. Kalyvas, was out on bond until November 1, 1997, while the Petitioner remained incarcerated during this time.

In *State of Ohio v. Peterson, Lowery, Rall, Barber and Ross*, 651 F.2d 687 (10th Cir. 1981), the court outlined that the borrowed limitations period does not begin to run until after the plaintiff has discovered it through the exercise of reasonable diligence.

In the case of *Samuel v. Michaud*, 980 F. Supp. 131 (D. Idaho 1996), the court outlined that state law controls which limitations period applies but federal law determines when a cause of action accrues the moment the plaintiffs become aware that they have suffered injury or have sufficient information to know that they have been injured.

In the case of *White-Ruiz v. City of New York*, 983 F. Supp. 365 (S.D.N.Y. 1997), the court outlined that a claim accrues when a plaintiff knows or has a reason to know of the injury as the basis of his action. If, however, a plaintiff is exposed to continuous practice and policy of discrimination, the commencement of the statute of limitation may be delayed until the last discriminatory act in furtherance of it is completed. *Eagleston v. Guido*, 41 F.3d 865, 870 (2d Cir. 1994).

IV.

THE DISTRICT COURT FAILED TO CONSIDER THE TOLLING PROVISION.

The Petitioner had outlined the dilemma of his incarceration in exhibit (8) of his brief filed with the Fifth Circuit. (*See* n.13, *supra*). The Petitioner had outlined the circumstances under the title of Cruel and Unusual Punishment at page 37 of his brief, but the District Court failed to consider his circumstances and did not allow him

the benefit of the tolling provision which is a fundamental and integral part of a well-organized justice system.

In the case of *Board of Regents v. Tomanio*, 446 U.S. 478, 10 S. Ct. 1790, 64 L. Ed. 2d 440 (1980), the Supreme Court stated: "statutes of limitations are not simply technicalities, but are fundamental to a well ordered judicial systems and exceptions to statutes of limitations, generally referred to as 'tolling' are integral part of a complete limitations policy." 64 L. Ed. 2d at 443.

Likewise, in the case of *Vaughn v. Grizalva*, 927 F.2d 476, 478 (9th Cir. 1991), the plaintiff was granted the benefit of revised Arizona tolling provision, and on remand, the District Court found no evidence that prisoner knew or reasonably should have known of the right to bring action at least two years before the complaint was filed.

The Petitioner's circumstances have been worst than the circumstances outlined in *Vaughn v. Grizalva*, *supra* due to the fact that the Petitioner was unable to contact anybody for fifteen months due to the circumstances of his incarceration. (*See* n.13, *supra*).

The Petitioner therefore asserts that the District Court abused its discretion by:

1) applying the one year statute of limitation for delictual actions including intentional torts and cited in its support the case of *Gaspard v. United States*, 720 F.2d 1097 (5th Cir. 1983) which has been a tort claim case under FCTA, 28 U.S.C. § 1346(b);

2) by not considering Petitioner's circumstances of his incarceration for fifteen months stemming from the actions of the Respondents;

3) failing to consider the application of tolling provision in Petitioner's case.

In Petitioner's case, the Respondents have still continued up to this date with their actions by violating his constitutional rights, whereby in the present case in New York, Petitioner's co-defendant is out on a signature bond and Petitioner remains in custody due to the actions of the Respondents.

V.

THE APPELLATE COURT ERRED IN DECIDING THAT PETITIONER'S CLAIMS FOR DAMAGES UNDER § 1983 WERE NOT PERMISSIBLE PURSUANT TO *HECK v. HUMPHREY*, 512 U.S. 477, 129 L. Ed. 2d 383, 114 S. Ct. 2364 (1994).

The Appellate Court in its decision in Appendix A, citing from *Heck v. Humphrey*, *supra*, stated:

> in order to recover damages for allegedly unconstitutional conviction for imprisonment, or for other harm caused by action whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by state tribunal authorized to make such determination, or called into question

> by federal courts issuance of a writ of Habeas Corpus §28 U.S.C. §2254. A claim for damages bearing that relationship to a conviction or sentence that has so been invalidated is not cognizable under § 1983."

In the support of its ruling, the Appellate Court cited *Stephenson v. Reno*, 28 F.3d 26 (5th Cir. 1994). The plaintiff in this case conceded that the basis of his § 1983 damage claim action was designated to challenge the constitution validity of his conviction and confinement. Within the ambient of *Heck v. Humphrey, supra*, such a claim is absolutely foreclosed and thus invalidates a claim filed under § 1983.

The Appellate Court further cited the cases of *Mackey v. Dickson*, 47 F.3d 744 (5th Cir. 1995) and *Spina v. Aaron*, 821 F.2d 1126, 1128-29 (5th Cir. 1987).

In the case of *Mackey v. Dickson, supra*, the court differentiated the claims that are barred by *Preiser v. Rodriguez*, 411 U.S. 475, 93 S. Ct. 1827, 39 L. Ed. 2d 439 (1973) and *Heck v. Humphrey, supra.*

Likewise, in *Spina v. Aaron, supra*, the court outlined that a *Bivens*-type claim constitutes, through the effects of *res judicata* and collateral estoppel, a direct challenge to the face or duration of his confinement which must be pursued through a *habeas corpus* under 28 U.S.C. § 2241, and such a claim is foreclosed by *Heck v. Humphrey, supra.*

The Petitioner asserts that the Appellate Court's understanding as to the violations of his due process is grossly misplaced.

The Petitioner has cited the violations of his due process by the Respondents from 1 to 6 in the previous section.

Various violations cited from 1 to 6 hardly mount to any collateral estoppel to his conviction and none of these acts from 1 to 6 cited by the Petitioner are any challenge to the constitutional validity of his conviction in Oklahoma due to the fact that the Respondent's acts are not related in any way or form to the Petitioner's prosecution and conviction.

It is a well-settled fact in law that in order to maintain an action for malicious prosecution under 42 U.S.C. § 1983, the underlying conviction must be therefore terminated or invalidated in plaintiff's favor and thus the Supreme Court declined in *Heck v. Humphrey*, *supra* to expand opportunities for collateral attack under 42 U.S.C. § 1983 for malicious prosecution.

In Petitioner's case, the Appellate Court, in imposing *Heck*'s estoppel, failed to make required findings as to the identity of the causes of action of both the underlying criminal case and the underlying conduct or omission on which this present claim is founded. The Appellate Court has assumed *in dictum* that whenever there is an underlying criminal case with conviction or sentence, there must be an automatic estoppel by *Heck* of any claim arising from the conduct or omission of culpable defendants, irrespective of their involvement in the prosecution of the Petitioner. There is nothing in *Heck* importing such bizarreness.

The cases of *Stephenson v. Reno* and *Spina v. Aaron*, *supra* are clearly very different from the Petitioner's case. In these cases the plaintiffs challenged their convictions through § 1983 claims and such challenges are completely foreclosed with the *Heck*'s doctrine.

The Appellate Court in its ruling considered the Petitioner's claim to be analogous to the cases of *Stephenson v. Reno* and *Spina v. Aaron*, *supra*, and thus foreclosed his § 1983 claim under *Heck*'s doctrine as a challenge to his conviction.

The District Court's decision and the Appellate Court's ruling to apply *Heck* as an estoppel to all of the Petitioner's claims in this action is an impermissible overreaching of *Heck* and usurpation by its judicial power and therefore abridging his substantive rights to redress his constitutional grievances.

The Supreme Court in *Heck v. Humphrey*, *supra* stated: "if the District Court determines that the action, even if successful, will not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed." 512 U.S. at 385.

Were the District Court to have made the required findings of the identity of the causes of action of the criminal case and the instant civil action filed under § 1983, the Court would have found separability of the instant claims and presumably extinguishing the claims defeasible under *Heck*. The Court therefore erred under law in doing so and thus erroneously applied the doctrine of *Heck* to bar Petitioner's claim.

CONCLUSION

The Petitioner concludes that the issues of: (a) dismissal under § 1915A(b)(1); (b) application of a one year statute of limitation pursuant to article 3492 for the State of Louisiana; (c) foreclosure of Petitioner's claim under *Heck*'s doctrine, outlined herein are massive and comprehensive violation of Petitioner's rights to due process that are protected by the Fifth Amendment of the United States Constitution and which deserve the attention of this honorable court and call for a Writ of Certiorari to review the decision of the Fifth Circuit Court of Appeals.

Respectfully submitted,

MULK RAJ DASS
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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED AND FILED JANUARY 20, 1999

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-30317
Summary Calendar

MULK RAJ DASS,

Plaintiff-Appellant,

versus

JOHN B.Z. CAPLINGER; CHRIS SALE,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Louisiana
USDC No. 97-CV-1971

Before EMILIO M. GARZA, DeMOSS, and BENAVIDES, Circuit Judges.

PER CURIAM:*

Mulk Raj Dass, federal prisoner # 97129-012, appeals the district court's dismissal of his *Bivens*** claims under

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

** *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

28 U.S.C. § 1915A(b)(1). Dass contends that the district court erred in holding that *Heck v. Humphrey*, 512 U.S. 477, 487 (1984), rendered some of his claims premature. Dass argues that the defendants' misrepresentations to him regarding the issuance of a bond violated his constitutional rights. He argues that the conditions in the Tulsa County Jail constituted cruel and unusual punishment. Dass contends that his detention was not justified under former 8 U.S.C. § 1252(a) and that his transfer to Oklahoma without a hearing violated Fed. R. Crim. P. 40(a). Dass also argues that the district court erred in holding that his claims, alleging constitutional violations occurring between March 1995 and December 1995, had prescribed.

In *Heck*, the Supreme Court held that

> in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254. A claim for damages bearing that relationship to a conviction or sentence that has not been so invalidated is not cognizable under § 1983.

512 U.S. 486-87 (footnote omitted). A federal prisoner's *Bivens* action is subject to the rule enunciated in *Heck*.

Stephenson v. Reno, 28 F.3d 26, 27-28 (5th Cir. 1994). If a plaintiff's successful pursuit of a civil rights claim challenges the validity of his criminal conviction, and the plaintiff cannot show that such conviction has been reversed, invalidated, or otherwise set aside, the court may properly dismiss the civil rights claim as frivolous. *Mackey v. Dickson*, 47 F.3d 744, 746 (5th Cir. 1995) (42 U.S.C. § 1983 complaint). However, if a successful civil rights claim will not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed in the absence of some other bar to the suit. *Id.* Because Dass's civil rights claims, if successful, would not demonstrate the invalidity of any criminal judgment against Dass, the claims are not premature under *Heck*.

The conduct underlying Dass's civil rights claims occurred between March and December 1995, and Dass did not file his civil rights complaint until October 1, 1997. The federal courts look to state law to determine the applicable limitations or prescriptive period for a *Bivens* claim. *Spina v. Aaron*, 821 F.2d 1126, 1128-29 (5th Cir. 1987). The applicable prescriptive period in Louisiana is one year. *Elzy v. Roberson*, 868 F.2d 793, 794-95 (5th Cir. 1989). Because Dass did not file his suit within one year from the alleged acts underlying his claims, his claims have prescribed. *See Elzy*, 686 F.2d at 794-95.

AFFIRMED.

APPENDIX B — REPORT AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DIVISION OF LOUISIANA, LAKE CHARLES DIVISION DATED AND FILED FEBRUARY 10, 1998

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

CIVIL ACTION NO. 97-1971

SECTION "P"
JUDGE TRIMBLE
MAGISTRATE JUDGE WILSON

MULK RAJ DASS

VERSUS

JOHN B. Z. CAPLINGER, ET AL

REPORT AND RECOMMENDATION

In accordance with the standing order of this court, this matter was referred to the undersigned Magistrate Judge for review, report and recommendation.

STATEMENT OF CLAIM

Before the court is a complaint filed by *pro se* petitioner, Mulk Raj Dass, on October 1, 1997 pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). Plaintiff

is currently confined in the Metropolitan Detention Center in Brooklyn, New York but was confined in the Federal Correctional Institute in Oakdale, Louisiana when he filed this action. He names John B. Z. Caplinger, the district director of the Immigration and Naturalization Service (INS) and Chris Sale, the acting director of the INS, as defendants.

Plaintiff states that he was detained at the Federal Detention Center in Oakdale, Louisiana pending deportation proceedings. He alleges that the defendants promised to release him on a $30,000 immigration bond, but they failed to follow through on this promise. Plaintiff was ultimately indicted on federal criminal charges in Oklahoma and was transferred to a county facility in Tulsa, Oklahoma to respond to the charges. Plaintiff contends that the foregoing actions of the defendants violated his constitutional rights under the Fifth, Sixth, Eighth and Fourteenth Amendments. He seeks monetary damages.

After reviewing the record herein, **IT IS RECOMMENDED** that this action be **DISMISSED WITH PREJUDICE.**

LAW AND ANALYSIS

I. Screening under 28 U.S.C. § 1915A

Title 28 U.S.C. § 1915A provides, in pertinent part,

> (a) Screening. — the court shall review, before docketing, if feasible or, in any event, as soon as practicable after docketing, a complaint in a civil

> action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity.
>
> (b) Grounds for dismissal. — On review, the court shall identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint —
>
> > (1) is frivolous, malicious, or fails to state a claim upon which relief may be granted; or
> >
> > (2) seeks monetary relief from a defendant who is immune from such relief.

It is noted that plaintiff has pre-paid the entire filing fee in this case. However, the foregoing statutory provision or the court's directions thereunder are not dependent upon pre-payment of the filing fee. This statutory provision is completely independent of the *in forma pauperis* statute found at 28 U.S.C. § 1915.

When determining whether a complaint is frivolous or states a claim upon which relief may be granted, the court must accept plaintiff's allegations as true. *Horton v. Cockrell*, 70 F.3d 397, 400 (5th Cir. 1996) (finding of frivolity); *Mahone v. Addicks Utility District* of *Harris County*, 836 F.2d 921, 926 (5th Cir. 1988) (Rule 12(b)(6) motion to dismiss).

Appendix B

II. Factual Background

The facts of the complaint are accepted as true for purposes of this evaluation. Additionally, the undersigned has reviewed the facts related by the Fifth Circuit in its dismissal of plaintiff's petition for review of an order of deportation. See *Dass v. INS*, docket no. 94-41219 (5th Cir. 1995) (unpublished).

Plaintiff entered the United States in May 1990. In December 1991, plaintiff was indicted on four counts of devising and implementing a fraudulent scheme to obtain money and property by false pretenses. In September 1992, plaintiff was convicted on all four counts following a jury trial. In the United States District Court for New Jersey. He was sentenced to serve twenty-one months imprisonment followed by three years of supervised release.

In March 1993, an order to show cause why plaintiff should not be deported was issued to plaintiff by the INS. In November 1993, plaintiff was ordered deported. In May 1994, the Third Circuit affirmed plaintiff's criminal conviction. *United States v. Dass*, 27 F.3d 559 (3rd Cir.), *cert. denied*, 514 U.S. 1002, 115 S.Ct. 514, 130 L.Ed.2d 421 (1994).

Plaintiff appealed the order of deportation to the Board of Immigration Appeals (BIA). The BIA denied and dismissed the in August 1994. Plaintiff then filed a petition for review in the Fifth Circuit. On August 8, 1995, the Fifth Circuit denied and dismissed the petition for review.

Appendix B

Plaintiff states that he completed his criminal sentence on March 9, 1995. He alleges that on March 8, 1995, while he was awaiting the decision from the Fifth Circuit, Caplinger promised his attorney that he would release plaintiff on a $30,000 bond. Plaintiff further alleges that in April 1995, Caplinger again promised plaintiff that he would permit his release on a $30,000 immigration bond if no decision was issued by the Fifth Circuit by the end of April. Plaintiff alleges that the defendants failed to deliver on this promise and instead, "illegally" "removed plaintiff to a different jurisdiction."

Plaintiff contends that his attorney was ready to go forward with a "bond hearing in a federal court in Louisiana, but wanted to have a final 'No' from the defendants."[1] The continuous promises from the defendants allegedly resulted in the attorney's failure to file the appropriate pleadings in federal court.

An arrest warrant was issued in Oklahoma for petitioner's arrest on an undisclosed date prior to May 5, 1995. Plaintiff alleges that he was illegally transferred to Oklahoma without being provided a hearing as required by Rule 40 of the Federal Rules of Criminal Procedure. On May 5, 1995, a detention hearing was conducted in Tulsa, Oklahoma in connection with the arrest warrant. At this hearing, an FBI officer testified that plaintiff was ineligible for an immigration bond. As a result, plaintiff was denied release and detained in Tulsa, Oklahoma.

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1. Presumably, plaintiff refers to a *habeas corpus* petition under 28 U.S.C. § 2241.

Plaintiff alleges that as late as May 4, 1995 that the defendants promised plaintiff that he would be released on an immigration bond if the Oklahoma court released plaintiff on bond pending the disposition of the criminal charges. On June 15, 1995, Caplinger permitted plaintiff to bond out; however, the amount of the bond was set at $75,000. On August 7, 1995, plaintiff was scheduled for a bond hearing on the criminal charges. However, plaintiff was advised that the $75,000 immigration bond was cancelled and he would not be permitted to be released on bond due to outstanding order of deportation. Therefore, plaintiff did not proceed with the bond hearing in the criminal case.

Plaintiff was ultimately indicted and convicted on one count of conspiracy to defraud and four counts of wire fraud in the United States District Court for the Northern District of Oklahoma. See *United States v. Kalyvas,* 127 F.3d 1110 (Table), 1997 WL 651761, (10th Cir. 1997), *cert. denied,* __ U.S. __, 118 S.Ct. 726, 66USLW 3456 (Jan. 12, 1998). He is currently serving thirty-seven (37) months imprisonment for these convictions.

III. Legality of Plaintiff's Decision

Initially, it is noted that plaintiff does not contend that his detention by the INS was illegal; nor can he.

Under the law as it existed in March and April 1995, the INS was authorized to detain any alien including plaintiff against whom deportation proceedings were pending. See former version of 8 U.S.C. § 1252(a). Furthermore, even if the district director had authorized plaintiff's release on an

immigration bond, the law as it existed in 1995 permitted the district director to revoke an immigration bond at any time and return the plaintiff to the custody of the INS. See former version of 8 U.S.C. § 1252(a)(3).

Clearly, deportation proceedings were pending in the Spring of 1995. It was within the discretion of the Attorney General whether to release plaintiff on bond pending deportation proceedings. Because plaintiff's detention was statutorily authorized, he cannot show that his confinement was unconstitutional. Therefore, he is not entitled to recover damages for his detention pending a final determination of deportability.

To the extent that plaintiff claims his transfer to and incarceration in Oklahoma was illegal, this claim is barred by the principle enunciated in *Heck v. Humphrey.* A civil rights claim that effectively attacks the constitutionality of imprisonment does not accrue until that imprisonment or sentence has been "reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." *Heck v. Humphrey*, 512 U.S. 477, 486, 114 S.Ct. 2364, 2372, 129 L.Ed.2d 383 (1994); *Hudson v. Hughes,* 98 F.3d 868 (5th Cir. 1996). Thus, to the extent that plaintiff challenges his transfer to Oklahoma and his incarceration there as illegal, the claim is barred by *Heck.*[2]

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2. However, it is noted that plaintiff was not entitled to a removal hearing under Rule 40 of the Federal Rules of Criminal

(Cont'd)

Appendix B

IV. Constitutional Violations

A review of the complaint fails to reveal that plaintiff's constitutional rights were violated. As discussed above, his detention was not unconstitutional. He claims that his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments were violated, but the allegations of the complaint, accepted as true for purposes of this evaluation, simply do not show that plaintiff's constitutional rights were violated.

The allegations fail to show that plaintiff was entitled to release from detention or that the actions of the defendants were not authorized by statute. Moreover, the allegations of the complaint demonstrate that plaintiff's confinement in the custody of the INS and incarceration pursuant to criminal convictions has been valid since September 1992.

However, even assuming that the defendants's actions in 1995 (prior to plaintiff's transfer to Oklahoma) constituted constitutional violations, the claims have prescribed.[3] This Court looks to state law to determine the applicable statute

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(Cont'd)

Procedure as he was already in the custody of the Attorney General. *Bandy v. United States*, 408 F.2d 518, 521 (8th Cir.), *cert. denied*, 396 U.S. 890, 90 S.Ct. 180, 24 L.Ed.2d 164 (1969). Plaintiff was merely being transferred. Plaintiff is not constitutionally entitled to be housed at any particular facility. *Meachum v. Fano*, 427 U.S. 215, 96 S.Ct. 2532, 49 L.Ed.2d 451 (1976).

3. Of course, those claims which are barred by *Heck* could not be barred by limitations as those claims do not accrue until plaintiff successfully challenges the validity of the incarceration in Oklahoma.

of limitations for Bivens actions. A one-year statute of limitations applies to *Bivens* actions which arise in Louisiana. *Gaspard v. United States*, 720 F.2d 1097 (5th Cir. 1983), *cert. denied*, 466 U.S. 975, 104 S.Ct. 2354, 80 L.Ed.2d 826 (1984). Thus, plaintiff's claims which are not directed to the validity of plaintiff's confinement in Oklahoma and which would not imply the validity of the Oklahoma conviction are barred by prescription as the defendants' actions occurred in the Spring of 1995 and this lawsuit was not filed until October 1, 1997. The district court is authorized to dismiss a claim as frivolous "it is clear from the face of a complaint filed *in forma pauperis* that the claims asserted are barred by the applicable statute of limitations." *Moore v. McDonald*, 30 F.3d 616, 620 (5th Cir. 1994).

Therefore, plaintiff's claim for monetary damages has no basis in fact or law and should be dismissed with prejudice as frivolous. Furthermore, the allegations of the complaint fail to state a claim upon which relief may be granted against the defendants. Thus, this action should be dismissed under 28 U.S.C. § 1915A.

V. Motion for Authorization for Service Upon Defendants

Plaintiff has filed a motion to serve the defendants. Because the undersigned has found this action to be frivolous, the motion should be denied.

ACCORDINGLY, IT IS ORDERED that the motion for authorization for service on the defendants is **DENIED.** Further, **IT IS RECOMMENDED** that the civil rights

claims be **DISMISSED WITH PREJUDICE**, *sua sponte*, under 28 U.S.C. § 1915A(b)(1).

Under the provisions of 28 U.S.C. § 636(b)(1)(C) and Fed.R.Civ.Proc. 72(b), parties aggrieved by this recommendation have ten (10) business days from service of this report and recommendation to file specific, written objections with the clerk of court. A party may respond to another party's objections within ten (10) days after being served with a copy thereof.

Failure to file written objections to the proposed factual findings and/or the proposed legal conclusions reflected in this Report and Recommendation within ten (10) days following the date of its service, or within the time frame authorized by Fed.R.Civ.P. 6(b), shall bar an aggrieved party from attacking either the factual findings or the legal conclusions accepted by the District Court, except upon grounds of plain error. *See Douglass v. United Services Automobile Association*, 79 F.3d 1415 (5th Cir. 1996).

Signed this 10th day of Feb., 1998 in chambers in Lake Charles, Louisiana.

s/ Alonzo P. Wilson
ALONZO P. WILSON
UNITED STATES MAGISTRATE JUDGE
611 Broad Street, Suite 209
Lake Charles, Louisiana 70601

APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA, LAKE CHARLES DIVISION DATED AND FILED MARCH 19, 1998

UNITED STATES DISTRICT COURT
FOR THE WESTERN DIVISION OF LOUISIANA
LAKE CHARLES DIVISION

CIVIL ACTION NO. 97-1971

SECTION "P"
JUDGE TRIMBLE
MAGISTRATE JUDGE WILSON

MULK RAJ DASS

VERSUS

JOHN B. Z. CAPLINGER, ET AL

JUDGMENT

For the reasons contained in the Report and Recommendation of the Magistrate Judge filed previously herein, and after an independent review of the entire record including objections filed by plaintiff, and concurring with the Magistrate Judge's findings under the applicable law;

IT IS ORDERED that the civil rights claims asserted in this action are **DISMISSED WITH PREJUDICE** under 28 U.S.C. § 1915A(b)(1).

Appendix C

THUS DONE AND SIGNED, in chambers, in Lake Charles, Louisiana, on this 19th day of March, 1998.

s/ James T. Trimble, Jr.
JAMES T. TRIMBLE, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED FEBRUARY 24, 1999

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-30317

MULK RAJ DASS

Plaintiff – Appellant

v.

JOHN B Z CAPLINGER; CHRIS SALE

Defendants – Appellees

Appeal from the United States District Court for the Western District of Louisiana, Lake Charles

ON PETITION FOR REHEARING

Before EMILIO M GARZA, DeMOSS and BENAVIDES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is DENIED

ENTERED FOR THE COURT:

s/ [illegible]
United States Circuit Judge